

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RUTH SMITH, Individually and as Widow for the)	
Use and Benefit of Herself and the Next Kin of)	
Richard Smith, Deceased,)	
)	
)	Civil No. 3:05-0444
Plaintiff,)	Judge Aleta A. Trauger
)	(Dist. Of MA No.
v.)	1:05-cv-11515PBS)
)	
PFIZER, INC., <i>et al.</i> ,)	
)	
)	
Defendants.		

DEFENDANTS' REVISED OBJECTIONS
TO PLAINTIFF'S DEPOSITION DESIGNATIONS

Defendants, Pfizer Inc and Warner-Lambert Company LLC (collectively, "Pfizer" or "Defendants") have set out herein their objections to the deposition designations identified in Plaintiff's Revised Deposition Designations served on April 20, 2010. Defendants anticipate the need to assert additional objections depending upon the evidence presented by Plaintiff, the Court's evidentiary rulings, and/or other matters that may arise before or at trial. Defendants set forth these objections without waiving those objections made in connection with motions in limine and ruled upon by the Court. Further, in consultation with plaintiffs, copies of the deposition transcripts containing the designations to which the filed objections apply will be provided to chambers today. In addition, Defendants are prepared to meet and confer further with Plaintiff over objections once Plaintiff indicates which deposition testimony Plaintiff actually intends to introduce at trial. Accordingly, Defendants respectfully and specifically reserve the right to: (1) withdraw at any time any objections identified; (2) supplement and/or amend their objections in response to the Court's rulings on pretrial motions or other evidentiary

matters; (3) supplemental and/or amend their objections in response to Plaintiff's intended and/or actual use of the testimony; and (4) supplement and/or amend their objections as otherwise permitted by the Court.

GENERAL OBJECTIONS

Defendants object to the use of any part of a deposition from which Plaintiff designated where the witness is within the subpoena power of the Court and where Plaintiff has not demonstrated that the witness is unavailable. Fed. R. Civ. P. 32(a)(4).

OBJECTIONS TO PLAINTIFF'S PROPOSED DESIGNATIONS

Defendants assert the following objections to Plaintiff's proposed deposition designations as identified by page and line:

Foundation: Out-of-court statements offered for their truth are hearsay not subject to any exception if they are made beyond the scope of a person's regular duties. *See* Fed. R. Evid. 802 and 803(6); *see also Redken Labs., Inc. v. Levin*, 843 F.2d 226, 229 (6th Cir. 1988). Also, a non-expert witness may not testify in the form of opinions or inferences beyond those opinions or inferences rationally based on the perception of the witness. *See* Fed. R. Evid. 701.

Hearsay: Absent a specific exception, evidence is inadmissible if it consists of an out-of-court statement offered for the truth of the matter asserted. Fed. R. Evid. 801, 802; *see also Rush v. Ill. Cent. R.R.*, 399 F.3d 705, 719 (6th Cir. 2005).

Hearsay-within-hearsay: Evidence is inadmissible if it consists of an out-of-court statement offered for the truth of the matter asserted and is hearsay-within-hearsay when those statements themselves contain out-of-court statements offered for the truth of the matter asserted. Each level of hearsay-within-hearsay is inadmissible absent some exception specific to each

level. Fed. R. Evid. 805; *see also Smith v. Highland Park Ruritan Club*, No. 3:06-CV-351, 2008 WL 2669107, at *4 (E.D. Tenn. June 27, 2008).

Non-final agency finding: Evidence is inadmissible if it consists of an out-of-court statement offered for the truth of the matter asserted, even when those statements are made by public agencies. Non-final, interim, or draft findings, or personal or other statements not made pursuant to agency authority do not fall under the public record exception to the hearsay rule and are, therefore, inadmissible. *See Toole v. McClintock*, 999 F.2d 1430 (11th Cir. 1993); *City of New York v. Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981) (quoting *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979).

Irrelevant: Irrelevant evidence is inadmissible. Fed. R. Evid. 402. Irrelevant evidence does not “tend[] to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401; *see also United States v. Blackwell*, 459 F.3d 739, 769 (6th Cir. 2006).

Irrelevant: Marketing, advertising, and publications (including other indications):

To the extent that Plaintiff has identified deposition testimony to purportedly support allegations of improper marketing, including testimony regarding publications on gabapentin and regarding other indications other than the indication for which Decedent was prescribed Neurontin, such testimony is irrelevant and inadmissible under Rules 401 and 402, the MDL court’s May 26, 2009 Order, and the facts of this case because there is no evidence connecting the testimony to the Decedent’s prescribers or their prescribing decision. (*See* Mem. & Order [1790] at 34, May 26, 2009); *see also In re Seroquel Prods. Liab. Litig.*, No. 06-MD-1769-Orl-22DAB, 2009 WL 223140, at *4-5 (M.D. Fla. Jan. 30, 2009); *Miller v. Pfizer, Inc.*, 196 F. Supp. 2d 1095, 1122-23 (D. Kan. 2002); *Alexander v. Smith & Nephew, P.L.C.*, 90 F. Supp. 2d 1225, 1235 (N.D. Ok.

2000); *In re Norplant Contraceptive Prods. Liab. Litig.*, No. MDL 1038, 1997 WL 81092, at *1 (E.D. Tex. Feb. 21, 1997). Further, this Court's ruling concerning advertising and marketing (Docket No. 191) is limited to that which is national in scope and which is relevant to the issue of a duty to test. Defendants do not withdraw or waive its previously made objections that have been ruled upon by the Court. However, testimony also pertains to marketing activities involving: countries where Neurontin was approved for more indications than in the United States, proposals or planning documents in anticipation of receiving additional approved indications, or proposals or planning or other documents that do not necessarily reflect actual statements made in connection with Neurontin to those outside of the company. Further, to the extent such testimony invites the jury to speculate as to the reasons why Mr. Smith was prescribed Neurontin in 2004, it is unfairly prejudicial and should be excluded.

Irrelevant: Other events: Reports of other events – *i.e.*, use of medications other than Neurontin, adverse event reports with medications other than Neurontin, and/or events other than Decedent's – lack substantial similarity to this case, and are, therefore, inadmissible as evidence of other incidents or accidents pursuant to Rules 401-404. *See Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 732-33 (6th Cir. 1994); *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102-03 (6th Cir. 1989); *Pride v. Bic Corp.*, 54 F. Supp. 2d 757, 760 (E.D. Tenn. 1998); *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 550-551 (W.D. Pa. 2003); *Wolf v. Proctor & Gamble Co.*, 555 F. Supp. 613, 622 (D.N.J. 1982).

Irrelevant: The *Franklin* litigation and other claims or actions: Evidence from the *Franklin* litigation and other claims, actions, or legal proceedings are inadmissible because they have no tendency to make more or less probable the existence of any fact of consequence. *See, e.g., McLeod v. Parsons Corp.*, 73 F. App'x 846, 853-54 (6th Cir. 2003); *CPC Int'l v. Northbrook*

Excess & Surplus Ins. Co., 144 F.3d 35, 45 (1st Cir. 1998); *Kinan v. City of Brockton*, 876 F.2d 1029, 1034-35 (1st Cir. 1989); *Barnes v. Koppers, Inc.*, No. 3:03CV60-P-D, 2006 WL 940279, at *3 (N.D. Miss. Apr. 11, 2006). In addition to being inadmissible under Rules 401 and 402, this deposition testimony is inadmissible under the MDL court's Fraud Order, and the facts of this case because there is no evidence connecting the exhibit to Decedent's prescribers or their prescribing decision. Deposition testimony from the *Franklin* litigation or other proceedings is inadmissible because it constitutes hearsay. Evidence is inadmissible as hearsay if it consists of an out-of-court statement offered for the truth of the matter asserted, even when those statements are made in a deposition from another litigation and the issues are sufficiently different that Defendant did not have the same opportunity and motive to cross-examine the witness. *See* Fed. R. Evid. 801; *Ritchie ex rel. Estate of Ritchie v. Stamler Corp.*, No. 98-5750, 2000 U.S. App. LEXIS 568, at *10-11 (6th Cir. Jan. 12, 2000).

Irrelevant: New Warning: Under Rule 407, measures taken after an injury or harm allegedly caused by an event, that if taken previously, would have made the injury or harm less likely to occur, are not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. Fed. R. Evid. 407. Thus, deposition testimony regarding Neurontin's new warning label and patient information guides is inadmissible to show liability under Rule 407. *See Stahl v. Novartis Pharms. Corp.*, 283 F.3d 254, 270 n.10 (5th Cir. 2002); *Lindsay v. Ortho Pharm. Corp.*, 637 F.2d 87, 94 (2d Cir. 1980); *Werner v. Upjohn Co.*, 628 F.2d 848, 854 (4th Cir. 1980); *see also Gray v. Hoffman-La Roche, Inc.*, 82 F. Ap'x 639, 646 (10th Cir. 2003).

Lack of personal knowledge: A witness may not testify to a matter unless evidence is introduced to show that the witness has personal knowledge of the matter. Fed. R. Evid. 602.

Rule of completeness: When a part of deposition testimony is offered into evidence by a party, an adverse party may introduce any other parts which ought in fairness to be considered with the part introduced. Fed. R. Civ. P. 32(a)(6); *see also* Fed. R. Evid. 106; *United States v. Holden*, 557 F.3d 698 (6th Cir. 2009).

Probative value substantially outweighed: To the extent the Court determines that deposition testimony objected to by Defendants on any relevancy ground is relevant, the testimony should still be excluded under Rule 403 because its probative value, if any, is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 403; *see Old Chief v. United States*, 519 U.S. 172, 180 (1997); *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988).

Answer fragment: Plaintiff designated only a portion of an answer, or designated an answer with no corresponding question.

Argumentative: The question is improper argument directed to the witness.

Asked and answered: The question has been previously asked and answered by the witness.

Assumes facts not in evidence. Question is premised on “facts” that have not been offered into evidence.

Compound. The question contains two or more separate questions.

Counsel testifying: The question consists of narrative by counsel rather than a question to the witness.

Cumulative: The question seeks testimony already provided by the witness. Fed. R. Evid. 403, 611; *see also United States v. Lloyd*, 462 F.3d 510, 516-17 (6th Cir. 2006).

Fails to refresh recollection: When an exhibit introduced at a deposition fails to refresh the witness's recollection, any testimony regarding the exhibit lacks foundation.

Form: The question is asked in an improper form.

Harassing the witness: The question is asked in a manner that harasses the witness.

Improper predicate: The question is preceded by improper colloquy.

Incomplete hypothetical: The question consists of a hypothetical that omits facts and is thus misleading to the jury.

Lack of personal knowledge: The witness has no knowledge of the subject matter of the question.

Misstates facts: The question misstates the facts contained in the record.

Misstates testimony: The question misstates previous testimony provided by the deponent or other witness.

Non-responsive: The designated testimony is not responsive to the question.

Privilege: The question seeks to elicit testimony that is protected by the attorney-client privilege.

Question fragment The designation consists of a portion of a question or a question with no corresponding answer.

Speculative: The question calls for the witness to speculate or guess about a subject.

Vague/ambiguous: The question is confusing, vague, ambiguous, and unintelligible.

INCORPORATION OF DEFENDANTS' MOTIONS *IN LIMINE*

Defendants incorporate by reference all objections to exhibits identified in designated testimony set forth in Defendants' Objections to Plaintiff's Proposed Trial Exhibits. Defendants

also incorporate herein the following motions *in limine*, and object to any exhibit on these grounds, based on their requests that the Court enter an Order excluding:

1. The guilty plea dated May 13, 2004; any negotiation, settlement, or agreement between Pfizer and/or Warner-Lambert with any government entity arising out of the guilty plea; or any related government finding or investigation of marketing of Neurontin in violation of the Food, Drug, and Cosmetic Act, and the fact of any such investigation.

2. Evidence offered by Plaintiff to show allegedly improper marketing or other conduct, including any marketing, advertising, or promotional materials or conduct concerning Neurontin (whether for off-label use or otherwise), including but not limited to, evidence of promotion, studies, letters from DDMAC, publications, testimony of sales and marketing representatives other than those who called on Decedent's prescribers, and other evidence not relied upon by Decedent's prescribers, as well as evidence of or reference to any other claims, actions, or legal proceedings related to Neurontin.

3. Any testimony of David Franklin or evidence of, or reference to, the separate and unrelated *qui tam* action styled *United States ex rel. Franklin v. Parke-Davis, Division of Warner-Lambert Company, & Pfizer Inc.*, Civil Action No. 1:96-DV-11651-PBS (D. Mass filed Aug. 13, 1996).

4. All evidence of and references to Food and Drug Administration regulatory actions related to Neurontin, including labeling, labeling changes, and patient information guides for Neurontin, that were issued after Richard Smith's death in May 2004.

5. Conduct unrelated to Neurontin, including (i) an August 31, 2009, settlement among Pfizer, the United States Department of Justice, and certain other government agencies, pursuant to which Pfizer and the Government agreed to settle certain *qui tam* actions against

Pfizer involving drugs other than Neurontin and (ii) a plea agreement between the Government and Pharmacia & Upjohn Company, Inc. involving the drug Bextra, as well as any related government finding or investigation in connection with the August 2009 Settlement or Pharmacia Plea.

6. Miscellaneous matters including references to Plaintiff's pleadings; evidence of or references to Defendants' corporate status, size, profits, financial condition, or employee compensation; evidence of or references to alleged conduct of a generic "pharmaceutical industry" or "drug companies"; references to the cost or resources of Defendants' legal defense or to the size, location, other clients, or nature of the legal practice of Defendants' or Plaintiff's law firms; evidence of or references to Defendants' insurance; references to the presence or absence of Defendants' corporate representatives at trial; evidence of or references to how Decedent's beneficiaries will use any jury award if Plaintiff prevails; attempts to instruct the jury as to the effect of its answers to the questions posed in the jury verdict form; references to the Golden Rule; evidence of or references to discovery disputes between the parties or other discovery activities by the parties; and post-mortem photographs.

7. Evidence of or reference to anecdotal adverse event reports.

8. Evidence, references, testimony or argument that Plaintiff's decedent's adult children have suffered any compensable harms as a result of their father's death. Any evidence or argument explicitly or impliedly suggesting that the impact of decedent's suicide on the adult children has any bearing on the amount of "consortium" damages, if any, that the jury might be asked to award to Plaintiff Ruth Smith as a result of her husband's suicide.

9. Testimony of Professor Charles King, III, an economist whom Plaintiff has designated as an expert witness. Professor King's testimony is inadmissible because it is

irrelevant to the particular facts of this case, substantially prejudicial, and the product of unreliable methodology.

DEFENDANTS' OBJECTIONS

Larry Alphs

June 21, 2007

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Lucy Castro
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Page: Objection(s):	0237:13 - 0237:14 Answer fragment; Probative Value Outweighed by Prejudice; Relevance: Marketing
Page: Objection(s):	0350:20 - 0350:25 Foundation; Vague/Ambiguous
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Page: Objection(s):	0422:11 - 0422:18 Assumes facts not in evidence; Foundation; Incomplete hypo
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James Cato

June 29, 2007

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Stephen Cristo

February 17, 2005

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Suzanne Doft

June 12, 2007

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Helen Duda-Racki

February 24, 2005

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Bruce Fleischmann

June 13, 2007

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John Ford

September 30, 2002

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David Franklin

September 12, 2000

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Page: Objection(s):	0158:05 - 0160:10 Hear: Other Litigation; Lack of personal knowledge; Opinion testimony; not qualified as an expert; Probative Value Outweighed by Prejudice; Relevance: Marketing
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Page: Objection(s):	0181:07 - 0182:08 Hear: Other Litigation; Hearsay; Probative Value; Outweighed by Prejudice; Relevance: Marketing
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Page: Objection(s):	0242:20 - 0243:09 Hear: Other Litigation; Probative Value Outweighed by Prejudice; Relevance: Marketing
Page: Objection(s):	0250:22 - 0251:10 Hear: Other Litigation; Hearsay; Opinion testimony; not qualified as an expert; Probative Value Outweighed by Prejudice; Relevance: Marketing
Page: Objection(s):	0268:21 - 0270:04 Hear: Other Litigation; Hearsay; Probative Value; Outweighed by Prejudice; Relevance: Marketing
Page: Objection(s):	0298:17 - 0301:07 Hear: Other Litigation; Probative Value Outweighed by Prejudice; Relevance: Marketing

Page: Objection(s):	0301:22 - 0305:03 Hear: Other Litigation; Lack of personal knowledge; Opinion testimony; not qualified as an expert; Probative Value Outweighed by Prejudice; Relevance: Marketing
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David Franklin

September 13, 200

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Page: Objection(s):	0310:15 - 0312:21 Hear: Other Litigation; Probative Value Outweighed by Prejudice; Relevance: Marketing
Page: Objection(s):	0319:08 - 0320:01 Hear: Other Litigation; Probative Value Outweighed by Prejudice; Relevance: Marketing
Page: Objection(s):	0332:19 - 0333:07 Hear: Other Litigation; Lack of personal knowledge; Opinion testimony; not qualified as an expert; Probative Value Outweighed by Prejudice; Relevance: Marketing

David Franklin

December 18, 2009

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Robert Glanzman

August 1, 2007

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Robert Glanzman

August 2, 2007

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Manfred Hauben

July 12, 2007

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Manfred Hauben

July 13, 2007

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Buford Hoskins

October 24, 2007

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Lloyd Knapp

June 26, 2007

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Lloyd Knapp

June 27, 2007

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Lloyd Knapp

June 28, 2007

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Lloyd Knapp

July 18, 2006

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John Knoop
January 23, 2008

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John Knoop

January 24, 2008

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Pamela Krancer

June 8, 2007

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Gayle Lawson
October 4, 2007

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Feng Li
February 8, 2008

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Edward Mackey
May 23, 2007

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July 2, 2007

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John Marino

July 3, 2007

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Paul McCombs

June 8, 2007

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Cynthia McCormick

February 14, 2008

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Avanish Mishra

June 14, 2007

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Avanish Mishra

June 15, 2007

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Ashley Moreland

July 25, 2007

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Cindy Smith-Charlton

October 3, 2007

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Leslie Tive
July 11, 2007

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Jareth Turner

October 11, 2007

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Christopher Wood

June 7, 2007

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Dated: May 12, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of May 2010, I electronically filed the foregoing document with the Clerk of the Court, United States District Court for the Middle District of Tennessee, using the CM/ECF system. True and correct copies of the foregoing documents are being served via the Court's CM/ECF system on the following:

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